

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

DECISION and ORDER

-vs-

10-CR-6111

CLARKSON AUTO ELECTRIC, et al.,

Defendants.

This case was referred by text order of the undersigned, entered June 11, 2010, to Magistrate Judge Marian W. Payson, pursuant to 28 U.S.C. § 636(b)(1)(A)-(B), ECF No. 3. On February 1, 2012, Judge Payson issued Decision and Order (“D & O”), ECF No. 230, denying the application of Defendants, Gerald Fretto, Matthew Lavilla, and Clarkson Auto Electric, Inc., ECF No. 172, for release of certain seized bank accounts in order to permit each to use them to obtain counsel. Additionally, in her D & O, Judge Payson denied Defendants’ application for production of Special Agent Erin Stacer’s notes, memorandum, spreadsheets and grand jury testimony. On February 15, 2012, Defendant, Matthew Lavilla and Defendant, Gerald Fretto timely filed objections to Judge Payson’s D & O and simultaneously sought reconsideration, ECF No. 236 and No. 238 respectively. Also, on February 15, 2012, Defendant Clarkson Auto Electric, Inc., filed papers joining in on the objections and applications to reconsider on the part of Lavilla and Fretto, ECF No. 237. On April 9, 2012, Judge Payson filed a Decision and Order denying Defendant’s application for reconsideration, ECF No. 247. Reconsideration, having been denied, Defendants now ask

the Court to decide their objections to Judge Payson's D & O.

Pursuant to 28 U.S.C. § 636(b)(1)(A), this Court must determine whether Judge Payson's D & O denying Defendants' application for the release of seized bank accounts in order to permit each to use them to obtain counsel and their application for production of Special Agent Erin Stacer's notes, memorandum, spreadsheets and grand jury testimony were clearly erroneous or contrary to law.¹ An order is "clearly erroneous" when the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Chen v. Bd. Of Immigration Appeals*, 435 F.3d 141, 145–46 (2d Cir. 2006) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982)). An order is "contrary to law" when it "fails to apply or misapplies relevant statutes, case law or rules of procedure." *Collens v. City of New York*, 222 F.R.D. 249, 251 (S.D.N.Y. 2004) (internal quotations omitted).

Upon a consideration of Judge Payson's D & O, as well as a review the transcript of the "Monsanto Hearing"² held before Judge Payson on August 22, 2011, ECF No. 176, including the items received into evidence, and after considering Defendants' objections, the Court finds that Judge Payson's D & O was neither clearly erroneous nor contrary to law.

¹At a court appearance on July 24, 2012, ECF No. 257, the Court *sua sponte* raised the query of the applicable standard of review, noting that none of the defendants had objected to the fact that Judge Payson had issued a "Decision and Order" as opposed to "Report and Recommendation," which would require *de novo* review. At that point, although they had not filed an objection relating to the standard of review or even raised the issue previously, Defendants, seizing on the Court's query, did argue that Judge Payson's determination, involving the right to counsel, mandated *de novo*. Accordingly, the Court gave Defendants until August 13, 2012 to submit any law in support of their now adopted position. However, Defendants did not do so, and, at a court appearance on August 14, 2012, indicated that they were in fact unable to find any law to support their argument.

² See *United States v. Monsanto*, 924 F.2d 1186 (2d Cir.), cert. denied, 502 U.S. 943 (1991)

Accordingly, for the reasons set forth in Magistrate Judge Payson's D & O, ECF No. 230, Defendants' application for the release of seized bank accounts in order to permit each to use them to obtain counsel and their application for production of Special Agent Erin Stacer's notes, memorandum, spreadsheets and grand jury are denied.

IT IS SO ORDERED.

Dated: August 14, 2012
Rochester, New York

ENTER:

/s/ Charles J. Siragusa

CHARLES J. SIRAGUSA
United States District Judge